89-1788

No. 89-___

In The

Supreme Court of the United States

October Term, 1989

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS, STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF NOATAK AND CIRCLE VILLAGE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DOUGLAS B. BAILY
Attorney General
State of Alaska

GARY I. AMENDOLA*
DOUGLAS K. MERTZ
Assistant Attorneys General
Office of the Attorney General
Department of Law
P.O. Box K
Juneau, Alaska 99811
(907) 465-3600

Attorneys for Petitioner
*Counsel of Record

May 14, 1990

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Did the states give up their immunity under the Eleventh Amendment when sued by an Indian tribe in federal court by consenting to be bound by the Commerce Clause of the United States Constitution upon entry into the Union?

2. Is an Indian group automatically a tribe for purposes of 28 U.S.C. § 1362 (federal jurisdiction over suits by Indian tribes) because it has received the same treatment as an Indian tribe in or received benefits under certain federal statutes?

3. Is there a federal question presented when a state statute providing state benefits to unincorporated communities with Native village governments is altered to avoid a state constitutional violation by making the state benefits available to all unincorporated communities, including those with Native village governments?*

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* This is an alternative question. See fn. 11 infra.

LIST OF PARTIES

Petitioner:

David Hoffman, Commissioner, Department of Community and Regional Affairs, State of Alaska

Respondents:

Native Village of Noatak

Circle Village

Other plaintiffs in the Proceedings below in District Court:

Native Village of Akiachak

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OTHER AUTHORITY

No. 89-___

In The

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DAVID HOFFMAN, COMMISSIONER, DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS, STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF NOATAK AND CIRCLE VILLAGE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

On behalf of the people of the State of Alaska, David Hoffman, Commissioner, Department of Community and Regional Affairs, State of Alaska, respectfully petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit opinion is reported at 896 F.2d 1157 (Appendix A, App. A-1). The October 28, 1987, Order of

the United States District Court for the District of Alaska, filed December 1, 1987, is unpublished (Appendix B, App. B-1).

JURISDICTION

On March 30, 1989, the Ninth Circuit issued an opinion reversing the decision of the United States District Court for the District of Alaska. The State of Alaska filed a petition for rehearing, and on February 12, 1990, the Ninth Circuit withdrew its March 30, 1989, opinion, denied the petition for rehearing, rejected a suggestion for rehearing en banc, and issued an amended opinion. *Native Village of Noatak v. Hoffman*, 896 F.2d 1157 (9th Cir. 1990). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Alaska legislature enacted a statute giving financial aid to unincorporated communities with Native councils [Alaska Statute 29.89.050]. On the advice of the Alaska Attorney General that this statute violated several provisions of the Alaska Constitution because it denied similar benefits to unincorporated communities without Native councils, the State broadened the program to extend aid to all unincorporated communities.[1] Several off-

[1] After the revenue-sharing program was expanded in 1981 to include all unincorporated communities, the

(Continued on following page)

reservation Native councils, including the Native Village of Noatak ("Noatak") and Circle Village,[2] sued the State in U.S. District Court, alleging that the State's decision to broaden the program violated the equal protection guarantees of the U.S. Constitution and several aspects of state law.[3] The District Court dismissed for lack of

(Continued from previous page)

legislature continued to appropriate funds for all the eligible communities in the expanded class. The fact that each community received less than the $25,000 authorized maximum was not due to expansion of the program, as the legislature appropriated funds for the full number of eligible villages under the expanded program. The legislature has always chosen, for its own fiscal reasons, to short-fund this revenue-sharing program. The state offered proof of these facts below. No evidence to the contrary was offered.

[2] Noatak is an unincorporated community with a Native council (the Native Village of Noatak) organized under the Alaska amendment to the Indian Reorganization Act. It has existed since before the first non-Natives came to Alaska. Circle is an unincorporated community founded in 1887 as a supply town for gold rush miners. Today Circle has both an unincorporated Native council (the Circle Village Council) and a multi-racial civic association (the Circle Civic Community Association). Both communities have Native majorities and non-Native minorities. Neither community is on or near an Indian reservation.

[3] The Native villages' sole theory under federal law was that by adding other communities to the program, the State deprived the villages with Native councils of the exclusive right to the available funds and that denial of the exclusive benefit was made on an improper discriminatory basis, i.e., solely because they were Indians. As stated in Judge Kozinski's dissent below, 896 F.2d at 1166, this claim – that it violates federal law by *not* treating Indians and non-Indians differently – is frivolous and so does not support federal question jurisdiction.

jurisdiction because the villages' suit against the state was barred by the Eleventh Amendment or, alternatively, because no federal question was presented.

The Ninth Circuit Court of Appeals reversed, ruling that Noatak and Circle Village were tribes for purposes of 28 U.S.C. § 1362, which gives federal courts jurisdiction over suits by tribes, because Noatak was organized under the Alaska amendment to the Indian Reorganization Act (25 U.S.C. § 473a), and because both Noatak and Circle Village received the same treatment accorded tribes in some federal statutes and were listed as "Native villages" in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 et seq. In so ruling, it rejected prior decisions of the Ninth Circuit and other circuits that tribal status must be proven by a detailed factual inquiry.[4] The Court of Appeals also reversed the district court with respect to whether the Eleventh Amendment applies to suits by tribes, squarely rejecting a decision by the Eighth Circuit that the Eleventh Amendment does bar such suits[5] and glossing over dicta to the same effect in two decisions of this Court.[6] Finally, the Ninth Circuit ruled that

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[4] The State believes that the Native Village of Noatak probably could meet the criteria in federal law for recognition as a tribe, but has serious doubts as to whether Circle Village could meet those criteria. The State's point is that it was improper for the Ninth Circuit panel to find *automatic* tribal status merely because some but not all federal statutes treat the villages as tribes for certain purposes.

[5] Standing Rock Sioux Tribe v. Dorgan, 505 F.2d 1135 (8th Cir. 1974).

[6] Arizona v. California, 460 U.S. 605, 614 (1983); United States v. Minnesota, 270 U.S. 181, 193-195 (1926).

a federal question was presented in this case, thus providing jurisdiction under 28 U.S.C. § 1362. The State petitioned for rehearing; the petition was denied on February 12, 1990.

REASONS FOR GRANTING THE WRIT

A. Summary

The decision of the Ninth Circuit will affect every State by denying each of them what had previously been assumed to be a constitutional protection, the right to be free from suit in federal court in the absence of consent or without an explicit abrogation of that right by Congress. It will affect each of hundreds of tribes and other Indian organizations in the country by creating a new standard by which an Indian group may achieve tribal status, and by giving each such group the right to sue states in federal court, a right that is usually denied to any entity other than the United States. The decision also directly conflicts with prior decisions of the Eighth Circuit and the Ninth Circuit, and with dicta in prior decisions of this Court.

B. Reasons

1. Impact of the Decision on the States. The decision will affect every State in the Union. The holding on the Eleventh Amendment will expose every State to suit in federal court by tribes, despite the fact that tribes have never before been recognized as exempt from the applicability of the Eleventh Amendment. Moreover, the logic

the court used – that the States waived immunity from suit by agreeing to a Constitution which mentions federal power over Indian matters – could be extended to other contexts, such as admiralty and interstate commerce, where this Court has already refused to recognize an exemption from the Eleventh Amendment.[7] This means the result of the court's approach may eventually affect an even greater group of potential plaintiffs than just Indian groups. Finally, the impact on the States will be exacerbated because the Ninth Circuit did not limit itself to suits by tribes recognized under existing law. Instead, it said that for jurisdictional purposes a much larger group of Indian organizations are considered "tribes."[8] The potential impact on States is, by any measure, major.

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[7] Welch v. Texas Department of Highways and Public Trans., 483 U.S. 468, 107 S. Ct. 2941 (1987) (interstate commerce); Ex Parte New York, No. 1, 256 U.S. 490 (1921) (admiralty).

[8] The State of Alaska's greatest concern relates not to tribal status itself, but with the potential proliferation of enumerated tribal powers in the off-reservation environment of Alaska. The assertion of tribal governmental powers where there are no reservation boundaries and Natives and non-Natives live side by side raises more than the possibility of conflict. For example, this Court already has pending before it a petition for certiorari in Donald Puckett, et al. v. Native Village of Tyonek, et al., No. 89-609. In *Puckett*, this Court is asked to review a Ninth Circuit decision upholding a non-reservation Alaskan Native village ordinance which constructively evicts non-members from the village of Tyonek by denying them housing. On April 16, 1990, the Solicitor General was asked to provide the views of the federal government on this issue.

2. Impact of the Decision on Indian groups. The Ninth Circuit decision is also significant because it may affect a substantial number of Indian groups all over the United States. In effect, the Ninth Circuit has changed the rules for determining how tribes are defined under federal law. At the least, the decision will foster uncertainty regarding the type and amount of funding that will be available to Indian groups throughout the Nation by adding an unknown number of new "tribes" to the pool of present recipients. Finally, the decision will dramatically expand the universe of "tribal" plaintiffs that will have access to the federal courts against states as well as other defendants.

3. Direct conflicts within and among the Circuits. The ruling of this Ninth Circuit panel directly conflicts with the decision of the Eighth Circuit in *Standing Rock Sioux Tribe v. Dorgan*, 505 F.2d 1135 (8th Cir. 1974), regarding the Eleventh Amendment. The Ninth Circuit in its opinion admitted as much, without even attempting to rebut the logic and interpretation of the *Dorgan* court. *Noatak*, 896 F.2d at pages 1161-1162. The ruling also conflicts with two other decisions by other panels of the Ninth Circuit, *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384 (9th Cir. 1988), and *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985).

In *Venetie* the Ninth Circuit rejected the claim that tribal status should be found merely because the Indian group was organized under a federal statute or had received benefits under some federal legislation intended primarily to benefit tribes. The court concluded that tribal status must be shown by a detailed factual examination of whether the group met the tribal recognition criteria

set out in federal law. The *Price* decision is in accord, even referring to the governing federal regulations as the factors to be considered in evaluating tribal status. See 25 C.F.R. Part 83. See also *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582-88 (1st Cir. 1979).

Finally, as to permitting such groups an exemption from the applicability of the Eleventh Amendment, the decision conflicts with recent decisions by this Court on Eleventh Amendment immunity. As recently as last summer, this Court stated that an abrogation of a state's immunity by Congress must be unmistakably clear and textual. *Dellmuth v. Muth*, ___ U.S. ___, 109 S. Ct. 2397 (1989). See also *Pennsylvania v. Union Gas Co.*, ___ U.S. ___, 109 S. Ct. 2273 (1989). Otherwise, a state is immune from suit in federal court unless it has consented to the suit. This Court has not recognized an exemption from Eleventh Amendment immunity for matters subject to federal oversight by the Constitution. In fact, it has rejected such arguments in cases involving interstate commerce and admiralty. *See Welch v. Texas Department of Highways and Public Trans.*, 483 U.S. 468, 489, 107 S.Ct. 2941, 2954 (1987) (interstate commerce); *Ex Parte New York*, No. 1, 256 U.S. 490 (1921) (admiralty). The decision below runs directly counter to those cases and could subject the states to suit in the federal courts in any area in which Congress has authority under article I, section 8 of the Constitution.

4. The Decision is Wrong on its Merits.

(a) The Indian Commerce Clause provides no basis for eliminating the States' sovereign immunity from suits by tribes.

The Ninth Circuit has misinterpreted the Indian Commerce Clause and misapplied the Eleventh Amendment. Under the Eleventh Amendment, a state normally

enjoys sovereign immunity from suit in a federal forum, unless it specifically waives the immunity or that immunity is abrogated by a specific act of Congress. Waiver by a state is not to be inferred simply because it has consented to suits in its own courts. *Port Authority of Trans-Hudson Corp. v. Feeney*, ___ U.S. ___, 1990 USLW 51955 (April 30, 1990); *Florida Department of Health and Rehabilitative Services v. Florida State Nursing Home Assoc.*, 450 U.S. 147, 67 L.Ed.2d 132, 101 S. Ct. 1032 (1981). Congress can abrogate a state's sovereign immunity protected by the Eleventh Amendment, but must do so expressly and with "unmistakenly clear" intent. *Dellmuth v. Muth*, ___ U.S. ___, 109 S. Ct. 2397 (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985).

It is undisputed that the State of Alaska has not waived its sovereign immunity from suit in this case. And there has been no Congressional abrogation of the state's sovereign immunity from suit by tribes in 28 U.S.C. § 1362 or elsewhere. Indeed, even the Ninth Circuit agreed. *Noatak*, 896 F.2d at 1162.

However, in this case, the Ninth Circuit took a different approach and declared that a state has no immunity from suit by an Indian tribe because each state consented to suit upon admission to the union by virtue of the acceptance of the Commerce Clause's grant of authority of Congress "to regulate commerce with the Indian tribes." U.S. Const. Art. I, Sec. 8, cl. 3. This Court has previously rejected that logic when it was argued that the Eleventh Amendment did not apply to other matters within the Constitutional authority of Congress. *See Welch v. Texas Department of Highways and Public Trans.*, 483 U.S. 468, 489, 107 S. Ct. 2941, 2954 (1987) (interstate commerce); *Ex Parte New York*, No. 1, 256 U.S. 490 (1921) (admiralty).

Moreover, the theory defies historical logic. When the Constitution was written, Indian tribes were not among the parties identified as being able to bring suit in federal courts. *Cherokee Nation v. The State of Georgia*, 5 Pet. 1 (1831). As stated by Chief Justice Marshall:

> These considerations go far to support the opinion that the framers of our Constitution had not the Indian tribes in view when they opened the courts of the Union to controversies between a State or the citizens thereof, and foreign states.

5 Pet. at 18.

Since the federal courts were not open to the Indian tribes at the time of adoption of the Constitution, the Ninth Circuit's conclusion that a constitutional clause regulating commerce with Indian tribes signifies a state's consent to suit by an Indian tribe is not logically supportable. As this Court stated in *Monaco v. Mississippi*, 292 U.S. 313 (1934):

> There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been "a surrender of this immunity in the plan of the convention." The Federalist, No. 81. The question is whether the plan of the Constitution involves the surrender of immunity when the suit is brought against a State, without her consent, by a foreign State.

292 U.S. at 322 (footnote omitted).

In *Monaco*, this Court decided it was in the plan of the convention that absent consent, a state was immune from suit by a foreign country and simply by entering the Union, a state did not so consent. Yet suits between a

state and a foreign country were directly identified in article III of the constitution as subject to federal judicial authority. How odd then that, according to the Ninth Circuit, a state consented to suit by Indian tribes by consenting to be bound "by the plan of the convention" when that plan did not even provide the tribes with access to the federal court system, much less the explicit right to sue a state.

Contrary to the Ninth Circuit's view, *Noatak*, 896 F.2d at 1164, the balance of federalism between the states and the United States regarding federal judicial power that was struck in 1789 did *not* account for Indian tribes. Congress' enactment of 28 U.S.C. § 1362 in 1966 did not change that balance, and did not authorize federal court suits by tribes against states. That statute contains no clear unmistakable abrogation of state immunity, and therefore cannot be read under *Dellmuth* to authorize federal court actions against states.

In short, the Ninth Circuit's analysis turns the real balance of federalism upside down. Indeed, under the Ninth Circuit's novel view, the federal courts have jurisdiction over *any* case brought by an Indian tribe against a state, even if the only legal question (other than the tribe's status as a federally recognized tribe) is purely a matter of state law. Nothing in 28 U.S.C. § 1362 can be read to open the federal courts' doors so widely.

(b) Tribal status cannot be based on merely being identified in or receiving benefits under certain federal statutes intended primarily to assist Native Americans.

The State of Alaska does not deny the existence of tribes in Alaska. In fact, the State of Alaska believes that a

majority of the Native villages listed in § 11(b)(1) of the Alaska Native Claims Settlement Act may well meet the criteria in 25 C.F.R. Part 83 for achieving tribal status.[8] As indicated in earlier decisions of the Ninth Circuit, there are well established criteria for determining whether a particular Indian group is a tribe. *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985). Those criteria include express statutory recognition, recognition by demonstrating that the group complies with standards under 25 C.F.R. § 83.7, or in some cases meeting criteria used by the Bureau of Indian Affairs before the adoption of regulations in 25 C.F.R. Part 83. *Price*, 765 F.2d at 627-628.

In this case, the state believes that Noatak may qualify as a tribe under federal law for certain purposes, though it has serious doubts about the claim of Circle Village. The state disagrees, however, with the holding of the Ninth Circuit that Indian groups in Alaska or elsewhere, and in the absence of express federal recognition, are not required to demonstrate tribal status by adhering to the federal acknowledgment process (25 C.F.R. Part 83) or by convincing a court that they meet the factual requirements of those regulations.

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[8] As early as 1988, in Native Village of Stevens v. Alaska Management & Planning, 757 P.2d 32 (Alaska 1988), the State of Alaska, as amicus curiae, told the Alaska Supreme Court the State believed that tribes may exist in Alaska, even though the Alaska Supreme Court eventually ruled otherwise. Native Village of Stevens, 757 P.2d at page 34 (Stevens Village does not have sovereign immunity because it, like most Native groups in Alaska, is not self-governing or in any meaningful sense sovereign).

The Ninth Circuit first decided that just because Noatak is organized under the Alaska amendment to the Indian Reorganization Act ("IRA"), 25 U.S.C. § 473a, it is a tribe for the purpose of asserting jurisdiction under 28 U.S.C. § 1362. Yet the Ninth Circuit failed to reconcile the *Noatak* decision with its 1988 decision in *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384 (9th Cir 1988).

In *Venetie*, the Ninth Circuit stated that "the language of the IRA's Alaska amendment, 25 U.S.C. § 473a, raises doubts as to whether IRA organization should be construed so conclusively in the case of Alaska Natives." 856 F.2d at 1387.[9] That doubt was, and still is justified.

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[9] In *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985), the Ninth Circuit previously indicated its belief that IRA organization for non-Alaskan Indians under 25 U.S.C. § 476 *was* conclusive evidence of tribal status. Thus, while organization under the IRA for a lower 48 tribe, under the restrictive language of 25 U.S.C. § 476, is clear indication that the group is a tribe because *only tribes are eligible under that section*, in Alaska organization under the IRA is not conclusive as to the tribal status of a particular group. Under the Alaska amendment to the IRA, Native groups that are not Indian tribes are expressly authorized to adopt a constitution:

> groups of Indians in Alaska *not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district*, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title.

25 U.S.C. § 473a (emphasis added).

Incorporation under the Alaska amendment to the IRA cannot be taken as conclusive of tribal status for another reason. Under the federal rules for recognition of tribes, an Indian can be a member of only one tribe. 25 C.F.R. § 83.7. Under the Alaska amendment to the IRA, a person may clearly be a member of more than one IRA entity.

Many Alaskan IRA councils were also formed in modern times as voluntary organizations, and not as successors to traditional political groups; presumably these IRA's would not qualify as tribes under *United States v. Mazurie*, 419 U.S. 544 (1975), and *Price*. *See also Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582 (1st Cir. 1979), *cert. denied*, 444 U.S. 866 (1979). Yet the Ninth Circuit ruling in *Noatak* apparently says they do qualify.

The Ninth Circuit also concluded that, because Noatak and Circle Village are listed in the Alaska Native Claims Settlement Act (ANCSA) as "Native villages," each is a tribe. That conclusion conflicts with the clear language of ANCSA which states that the term " 'Native village' means any tribe, band, clan, group, village, community, or association in Alaska." 43 U.S.C. § 1602(c).

Finally, in what may or may not have been an independent basis for deciding that Noatak and Circle Village are tribes for the purpose of 28 U.S.C. § 1362, the Ninth Circuit ruled that because Noatak and Circle Village received the same treatment as tribes in certain federal legislation, they are tribes for purposes of 28 U.S.C. § 1362. The Ninth Circuit said that "the nature, and scope of the federal government's relationship with the Native

Villages, as evidenced by these Acts indicates that the recognition [of tribal status] extends to legal claims." *Noatak*, 896 F.2d at 1160.

However, as the Ninth Circuit itself recognized, those statutes are all prefaced by the phrase "[f]or the purpose(s) of this chapter." Such a limitation makes the leap to general tribal recognition inappropriate. Moreover, it ignores the fact that Congress has also passed legislation – such as the recent amendments to the Clean Water Act – that exclude off-reservation Alaska Native villages from treatment as tribes (33 U.S.C. §§ 1377(g), (h)), and other legislation that clearly distinguishes between tribes and Alaskan Native villages, e.g., the Resource Conservation and Recovery Act, 42 U.S.C. § 6903(13)(A).[10]

Thus, if any conclusion can be reached from federal statutes, it is that Congress has always carefully avoided making Alaskan Native villages tribes for all purposes simply because they may be defined as tribes for the purpose of specific federal programs. While some of them may well be tribes, it is improper to conclude that they are all tribes, as a matter of law, merely because Congress has recognized them as such for certain specific purposes.

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[10] As other examples of Congress *not* treating Alaskan Native villages as tribes for all purposes, see the Indian Self-Determination Act, 25 U.S.C. § 450b(e); Indian Financing Act, 25 U.S.C. § 1452(b); and the Indian Tribal Governmental Tax Status Act, 26 U.S.C. § 7701(a) (40) (A). Significantly, the most recent amendments to the Alaska Native Claims Settlement Act also contain a disclaimer of any intent to validate claims of sovereign authority (P.L. 100-241, § 17(a), 101 Stat. 1788).

(c) There is no federal question in this case.[11]

In the final issue on appeal, the Ninth Circuit ruled that the federal question presented by Noatak and Circle Village (i.e., that the expansion of the revenue sharing program to include all unincorporated communities was racially motivated and thus was not proper) was not "plainly meritless," and therefore, the federal courts have jurisdiction under 28 U.S.C. § 1362. *Noatak*, 896 F.2d at 1165.

Noatak and Circle Village argued below that states may single out Indian tribes and their members for special treatment, so the actions taken by the State of Alaska to expand the program were somehow impermissible under the Fourteenth Amendment, even though those actions had the effect of providing revenue sharing on an

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[11] Even though this question apparently does not satisfy this court's certiorari criteria, it is presented *alternatively* in the event the Court deems correct the view expressed by Judge Kozinski, dissenting below, that the absence of a federal question is so clear that the complaint should have been dismissed on this ground without reaching the other issues. Although we agree with Judge Kozinski, we are *not* urging this Court to vacate the judgment with directions to affirm the district court on this alternative ground alone. While that theoretically would remove this case as a binding precedent, the decision would still have substantial practical effect both within the circuit and perhaps elsewhere. Our primay submission, accordingly, is that the Court grant certiorari on the first two questions presented, and perhaps discuss the lack of a federal question while addressing the Ninth Circuit's novel approach to Eleventh Amendment jurisprudence, which apparently does not require a federal question when the case is brought by Indian tribes.

equal basis to an expanded set of communities in rural Alaska. The argument is without merit for at least three reasons. First, the expanded class of communities in rural Alaska that received revenue under this program received virtually the same amount per community as the Native villages received by themselves prior to the expansion.

Secondly, it is illogical to assert that racial discrimination has occurred by actions which spread revenue sharing benefits among a larger (and more equal) class of similarly situated communities. As Ninth Circuit Judge Kozinski stated in dissent in *Noatak:*

> The villages' purported federal claim is that the state, once having decided to favor Indians over other citizens, is now precluded from treating them the same. As a matter of federal equal protection, this claim is frivolous: I am aware of no constitutional provision that requires a state to treat Indians and non-Indians differently. Whi' the equal protection clause may *permit* stat to favor Indians, it certainly does not compel it.

Noatak, 896 F.2d at 1167 (emphasis in original).

Third, since states do not have a trust relationship with tribes, it is doubtful that they can provide benefits only to Indians without violating state equal protection provisions. *Washington v. Confederated Bands of the Yakima Indian Nation*, 439 U.S. 463, 500 (1979); *Queets Band v. State of Washington*, 765 F.2d 1399, 1404 (9th Cir. 1985).

Noatak and Circle Village also argued, and the Ninth Circuit agreed, that a cause of action in this case included violations of federal law and policy intended to further

tribal self-government. However, Noatak and Circle never showed how it impedes their self-government for the state to give other communities the same benefits it gives to Native communities, nor have they ever identified any federal law or policy which is frustrated by equal revenue sharing.

Equally important, the alleged violation is dependent on finding a violation of state law only: there is nothing in federal law that requires states to share revenue with Indian groups – which Noatak and Circle concede – and there is certainly nothing in federal law that requires the state to give public benefits to Indian groups and deny the same benefits to others. The mere fact that the state required the funds to be used or not used for certain public purposes is the prerogative of the provider. To label that as an infringement on tribal self-government is to assume that the money was provided for the purpose of furthering tribal self-government in the first place. Tribal self-government is not an issue in this case, because the purpose of the state program was not to further tribal self-government. The provision of funds to rural communities to help support community services was the reason for the program.

Most importantly, even if there is some implication or allegation of a federal question in this case, there must be some basis and substance behind it. As this Court has stated more than once:

> "[T]he federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit,' 'wholly insubstantial,' 'obviously frivolous,' 'plainly unsubstantial,' or 'no longer open to discussion.' "

Noatak, 896 F.2d at 1166 (Judge Kozinski dissenting) (quoting *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974) (citations omitted)). Such are the "federal questions" in this case.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's decision should be reviewed and reversed by this Court. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Douglas B. Baily
Attorney General
State of Alaska

By: Gary I. Amendola
Assistant Attorney General
Counsel of Record

Office of the Attorney General
State of Alaska
Department of Law
P.O. Box K – State Capitol
Juneau, Alaska 99811
(907) 465-3600

May 14, 1990

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

NATIVE VILLAGE OF AKIACHAK, NATIVE VILLAGE OF NOATAK, AND CIRCLE VILLAGE ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

EMIL NOTTIE, AS COMMISSIONER OF DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS, STATE OF ALASKA,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER A85-503

[ ] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT Plaintiffs' claims are dismissed, with prejudice as to federal court, but without prejudice to their being filed again in state court.

APPROVED:

/s/ Andrew J. Kleinfeld 11/5/87
U.S. DISTRICT JUDGE

/s/ November 5, 1987 — JoAnn Myres
Date — *Clerk*

cc: Lawrence Aschenbrenner
Michael Walleri
Hal Brown (AAG)
O & J 3219

/s/ Pam Richter
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NATIVE VILLAGE OF AKIACHAK, NATIVE VILLAGE OF NOATAK, AND CIRCLE VILLAGE ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, Plaintiffs, vs. EMIL NOTTIE, AS COMMISSIONER OF DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS, STATE OF ALASKA, Defendants.	ORDER (Filed Oct. 29, 1987)

A85-503 CIV

For the reasons stated during and at the conclusion of oral argument on October 28, 1987,

IT IS ORDERED that:

(1) Plaintiffs' claims are dismissed, with prejudice as to federal court, but without prejudice to their being filed again in state court.

(2) The preliminary injunction previously issued in this case is dissolved.

(3) Plaintiffs have 30 days to move for an award of any amounts which should be paid out of the bond posted as security for the preliminary injunction.

DATED at Anchorage, Alaska this 29 day of October, 1987.

/s/ Andrew J. Kleinfeld
ANDREW J. KLEINFELD
United States District Judge

cc: Michael J. Walleri
Hal Brown (AAG)

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

NATIVE VILLAGE OF AKIACHAK, NATIVE VILLAGE OF NOATAK, and CIRCLE VILLAGE COUNCIL, Plaintiffs, vs. DAVID HOFFMAN, AS COMMISSIONER OF DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS, STATE OF ALASKA, Defendants.	Case No. A85-503 Civil Anchorage, Alaska Wednesday, October 28, 1987 1:30 O'Clock P.M. Oral Argument on Defendant's Motion to Dismiss, Plaintiff's Motion for Partial Summary Judgment and Defendant's Cross-Motion for Summary Judgment BEFORE ANDREW J. KLEINFELD U.S. DISTRICT COURT JUDGE

(Filed Dec. 1, 1987)

APPEARANCES:

For Plaintiffs: LAWRENCE A. ASCHENBRENNER
Native American Rights Fund
310 K Street, Suite 708
Anchorage, AK 99501
(907) 276-0680

For Defendants: DOUGLAS MERTZ
Assistant Attorney General
P.O. Box K – State Capitol
Juneau, AK 99811
(907) 465-3600

Court Recorder: RICH WENRICH
U.S. District Court 701 C. Street, Box 4
Anchorage, AK 99513
(907) 271-5568

Transcription Service: V/ARS, Inc.
1300 T Street
Sacramento, CA 95814
(916) 448-2457

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* * *

(p. 37) THE COURT: Thank you, Mr. Aschenbrenner. I'll rule on the motion to dismiss at this time.

The lawsuit here is by Native Village of Akiachak, the Native Village of Noatak and Circle Village. It's apparent on the face of the complaint, as well as the cognizable evidence subsequently submitted that the Native Village of Akiachak has no standing here.

The state law, which is the underlying issue in this case, relates to native – to villages which are not incorporated as a city. Akiachak was incorporated. The ground for putting its into the complaint was that it was anticipated by the Plaintiffs that by the time the complaint came to a decision, Akiachak would no longer be incorporated. That didn't turn out to be so. So as to Akiachak, the claims must be dismissed for lack of jurisdiction. The standing is jurisdictional.

As to Circle Village, since there was no application for the funds during '82, '83 and '84, Circle Village has no standing to challenge the administration of the program

during those years. However, that leaves in Noatak, and it leaves in Circle Village for Fiscal Year 1985.

(p. 38) For there to be jurisdiction, there has to be some exception to applicability of the 11th Amendment. The lawsuit is against the Commissioner for the State, and the State itself. The remedies sought would be paid out of the State Treasury.

The injunction sought by the Plaintiffs would order the Commissioner to pay over $853,587.51 in revenue sharing funds, which on the face of the complaint are State monies. The final judgment sought by the Plaintiffs would be in part declaratory, but the value of the declaratory judgment would be that it would support a payment of monies out of the State Treasury. In addition, interest is sought.

So on its face, this is a suit by parties seeking to impose a liability which must be paid for public funds in the State Treasury, and would therefore be barred by the 11th Amendment.

Since the program no longer exists in its previous form, there can be no threat of future action which is the subject of this lawsuit, the lawsuit relates entirely to payment of money in the past.

There is no showing that the State has waived its sovereign immunity with respect to suits in federal court, although it may have waived its sovereign immunity with respect to suits in the state court for these claims.

That leaves remaining the question of whether (p. 39) the Congress by special enactment has abrogated the State's immunity. I'm inclined to think that it has not, that

28 USC 1362 should not be read as an abrogation. However, there are a number of district court cases which seem to say that the 11th amendment is abrogated when actions are brought under 28 USC Section 1362. Therefore, even though I am inclined to dismiss for lack of jurisdiction because of the State's sovereign immunity under the 11th Amendment, I am going to proceed, as an alternative, to the 28 USC Section 1362 issues.

28 USC Section 1362 provides that the district courts have original jurisdiction of civil actions brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter and controversy arises under the constitution, laws or treaties of the United States.

The question of whether the Plaintiffs in this case, or I should say, whether the Native Village of Noatak and Circle Village during Fiscal Year 1985, are an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior. That question is a close one.

The Question of whether the matter in controversy arises under the constitution, laws or treaties of the United States, strikes me as a less complex question. There is no jurisdiction in the federal courts to hear a (p. 40) case merely because an Indian or an Indian tribe is a party to it. That is an axiom recited in Wright and Miller, Section 3579.

28 USC Section 1362 appears to have been passed in response to a 9th Cir. decision in 1964. That decision said that a certain suit by Indian tribes could not be brought because there was no showing that more than $10,000

was in controversy, which the federal question jurisdiction then required.

The purpose of the statute, according to the analysis in Wright and Miller, is to prevent Indian tribes or bands recognized by the Secretary to bring suits which raise a federal question, even if the amount in controversy is less than $10,000.

That has been somewhat broadened by decisions interpreting Section 1362, but the decisions seem to relate only to Indian land issues, because Indian title is a matter of federal law, and therefore, the right to possession arises under federal law.

Under *Ghila River Indian Community vs. Heningson*, it is not correct to read Section 1362 to provide jurisdiction for a tribe to bring any action where the United States could have brought an action on behalf of the tribe under 25 USC Section 175.

The arising under language of Section 1362 is (p. 41) identical to that in Section 1331, and therefore, except for possessory rights of tribes to tribal lands, generally refers to federal questions in the traditional sense. That leads us to the question, and again, I have not decided that the tribes in this case are Indian tribes or bands with governing bodies duly recognized by the Secretary of the Interior. That's a difficult question on which the Plaintiffs might not prevail under *Price vs. State of Hawaii*, 764 F. 2d 623, but I'm just not reaching it.

What persuades me in this case is that there is no federal question. The State passed the statute, the gravamen of Plaintiffs' complaint is that the Commissioner of

the Department of Community and Regional Affairs of the State did not obey the state law.

That is about as clear a state question as there could be. I'm going through the complaint to see whether it stated a federal question. Obviously, dependent state claims in the 5th through the 8th causes of action do not state federal questions.

The 1st Amendment claim in the 4th cause of action impresses me as frivolous. There is nothing about giving the money to White villages, as well as native villages, for which any facts are stated to show that this would impair or prevent persons in the native villages from speaking or associating with each other, or practicing (p. 43) their religion, and the mere conclusary statement that it wouldn't is not enough to create a federal question where the facts stated show that it would not.

The third cause of action also impresses me as patently without merit, and insubstantial to the extent that it does not involve a federal controversy. The Third cause of action alleges that the actions of the Commissioner, or rather, the Department of Community and Regional Affairs violated a statute, a federal statute granting native tribes and states the unrestricted rights to contract with each other.

However, there's no allegation, there are no facts stated to show any impairment of any right to contract with native tribes. If the Commissioner had said, I won't give the money to any native villages because they don't have the right to contract with the State of Alaska to receive money, then we might have an issue falling within the third cause of action stated by the Plaintiff.

But he didn't say that. He said he would give the money to the state villages, and this was not a contract for services, or something else more obviously a contract; it was simply a unilateral grant. He said he would give the money to the native villages and also to the white villages.

So the facts stated don't show any impairment (p. 43) of any right to contract.

With regard to the second cause of action, the actions of the Department infringed upon tribal powers of self-government. This impresses me as being similar to the 1st Amendment claims in the fourth cause of action. The facts stated don't show how giving the native villages their money, and giving white villages the money too, or for that matter, giving the native villages somewhat less money than the Legislature intended them to have would infringe upon tribal powers of self-government.

It would mean that taking the facts most favorably to the Plaintiff, that some of these village governments might have less money. That would – to read into that an illegal infringement upon tribal rights of self-government, though, would take federal courts into political questions of forcing state governments to appropriate money.

The first cause of action which I backed up to is the hardest, and that's why I worked up to it backwards. The first cause of action says that the actions of the Commissioner in expanding the class to include entities other than the native village governments were taken under color of state law, and based solely on racial ancestry and therefore, violated due process, equal protection, Indian

commerce and supremacy clauses of the United States (p. 44) Constitution, and federal common law, authorizing discreet treatment of Indian tribes.

It appears to me that this claim as well is patently without merit. The Plaintiffs concede, as I think they must, that if the Legislature had passed the law at the beginning to say what it ultimately said after it was revised, the Department shall pay to each unincorporated community an entitlement of $25,000 each fiscal year to be used for public purpose, that there would be no violation of law here.

Commissioner Notti interpreted the old law to mean what the new law says because of what he perceived to be partly or entirely state constitutional objections to the old law. However, if the new law would not violate federal law in these respects, then neither would the administrative interpretation of the old law to mean what the new law says.

Furthermore, I cannot see how treating people alike, regardless of what race they have, discriminates against people on account of their race. I understand the argument that the Plaintiffs made, it just does not strike me as consistent with what the words say in the 14th Amendment to the United States Constitution.

I make no determination of whether Commissioner Notti was correct or incorrect in reading Alaska law as he (p. 45) did, because whether he was right or wrong, there's no federal question.

The matter in controversy does not arise under the constitutional laws or treaties of the United States. It arises solely under Alaska law.

As to whether the Circle Village Claim for 1985 is res judicata, I do not reach that question because I find a lack of jurisdiction on the alternative grounds of 28 USC Section 1362 and the 11th Amendment. Accordingly, Plaintiffs' claims are dismissed. The dismissal is with prejudice in federal court, but it is without prejudice, the reassertion of the claim in the state court.

The injunction which has been issued in this case is dissolved. The bond is not exonerated at this time. I'll give counsel an opportunity to make any showing of charges which should be made against the bond. Is 30 days adequate for that?

MR. MERTZ: Yes, Your Honor.

THE COURT: Defendants may file within 30 days whatever materials are necessary to make any claim against the bond if it's in the –

MR. ASCHENBRENNER: Your Honor?

THE COURT: Mr. Aschenbrenner?

MR. ASCHENBRENNER: Your Honor, would it be possible to have the injunction continued for 10 days during (p. 46) which time we can file our notice of appeal? Otherwise, the funds are apt to be disbursed, and then they would be gone.

THE COURT: I can't enjoin something if I don't have jurisdiction over the case. I understand what you're saying, but I don't think it's logical for me to do that, if I

don't have jurisdiction, which I don't think I do, I don't think this court has jurisdiction, then it can't be ordering people to do or not do things.

MR. ASCHENBRENNER: Thank you, Your Honor.

THE COURT: Is there anything further?

MR. ASCHENBRENNER: No, Your Honor.

MR. MERTZ: No, Your Honor.

THE COURT: Thank you, counsel.

(Whereupon the hearing in the above-entitled matter was adjourned at 2:52 p.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Patricia A. Petrilla November 25, 1987
Patricia A. Petrilla, Transcriber

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF NOATAK; CIRCLE VILLAGE, Plaintiffs-Appellants, and NATIVE VILLAGE OF AKIACHAK, Plaintiff,	)	Nos. 87-4310; 87-4374
v.	)	D.C. No. CV-85-503-AJK
DAVID HOFFMAN, as Commissioner, Department of Community and Regional Affairs, State of Alaska, Defendant-Appellee.	)	

APPEAL from the United States District Court for the Alaska District of Anchorage.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Alaska District of Anchorage and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is REVERSED and REMANDED.

cy: L. Aschenbrenner
M. Walleri
H. Brown (AAG)
Judge Kleinfeld

Filed and entered February 12, 1990

NATIVE VILLAGE OF NOATAK; Circle Village, Plaintiffs-Appellants,

and

Native Village of Akiachak, Plaintiff,

v.

David HOFFMAN, as Commissioner, Department of Community and Regional Affairs, State of Alaska, Defendant-Appellee,

Nos. 87-4310, 87-4374.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 3, 1988.

Decided Feb. 12, 1990.

Native Villages brought federal and state claims against Alaskan official, seeking order directing that official pay over revenue sharing monies appropriated by legislature for Villages and prohibiting him from diluting Villages' share of monies. The United States District Court for the District of Alaska, Andrew Kleinfeld, J., dismissed action for lack of jurisdiction, and Native Villages appealed. The Court of Appeals, Noonan, Circuit Judge, held that: (1) Village with governing body approved by Secretary and Village listed as Native Village in Alaska Native Claims Settlement Act qualified for benefits of federal statute providing federal district courts with original jurisdiction of civil actions brought by recognized Indian tribes when matter arose under federal law; (2) states had consented to federal jurisdiction of Indian affairs through federal constitutional clause providing Congress with power to regulate commerce with Indian tribes, and Eleventh Amendment did not

revoke consent of states to federal jurisdiction over Indian affairs, so states were not immune from suit by Indian tribes; and (3) federal district court had jurisdiction over claim that state had racially discriminated by diluting bonus granted to Native Villages as entities on racial grounds and over allegation that official violated federal laws and policies intended to further tribal self-government.

Reversed and remanded.

Kozinski, Circuit Judge, filed dissenting opinion.

Opinion, 872 F.2d 1384, withdrawn.

Lawrence A. Aschenbrenner and Robert T. Anderson, Anchorage, Alaska, for plaintiffs-appellants.

Gary I. Amendola and Douglas K. Mertz, Asst. Attys. Gen., Juneau, Alaska, for defendant-appellee Hoffman.

Appeal from the United States District Court for the District of Alaska.

Before KOZINSKI, NOONAN and THOMPSON, Circuit Judges.

ORDER

The opinion filed March 30, 1989 is hereby withdrawn. The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. General Order 5.4(b) now applies.

OPINION

NOONAN, Circuit Judge:

The Native Village of Noatak, the Native Village of Akiachak and Circle Village brought this action against the Commissioner of the Department of Community and Regional Affairs of the State of Alaska (the Commissioner). The district court dismissed the case for want of jurisdiction. The Native Village of Noatak and Circle Village (the Native Villages) appeal to this court. We reverse and remand.

The Parties

Noatak is a government with a local governing board organized under the Indian Reorganization Act, 25 U.S.C. § 461 *et seq*. Circle Village has a traditional Council form of government. The defendant Commissioner is the principal officer of a department of the state of Alaska, responsible for administering the payment of revenue-sharing funds.

The Causes of Action

The Native Villages allege that they have been authorized to receive their pro rata share of the funds appropriated by the Alaska Legislature, up to $25,000, in accordance with Alaska Stat. §§ 29.89.010 and 29.89.050, which provided, "the state shall pay $25,000 to a Native Village government for a village which is not incorporated as a city under this title." Alaska Stat. § 29.89.050 (1980). The plaintiffs allege that the Commissioner deliberately expanded the class of eligible recipients to include

entities other than the Native Villages solely because of the racial ancestry of the individual members of the villages, in violation of the federal Constitution, of 42 U.S.C. § 1983 and of federal common law authorizing discrete treatment of Indian tribes, with the result that their share was diluted.

As a second cause of action the Native Villages assert that in so diluting the funds available, the Commissioner violated federal laws and policy intended to further tribal self-government, including the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*; the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-41; the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.*; the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 *et seq.*; the Indian Health Care Improvement Act, 25 U.S.C. §§ 1601-1680; and the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 *et seq.*

As a third cause of action the Native Villages allege that the Commissioner's conduct also violated 25 U.S.C. § 476, which, they contend, grants native tribes the unrestricted right to contract with states. As a fourth cause of action the Native Villages claim that the Commissioner's conduct violated the First Amendment by destroying native culture and therefore their most basic form of expression, religion and association. Four additional claims are put forward as pendent state claims. The plaintiffs seek damages, an order directing the Commissioner to pay over the monies appropriated by the Legislature and an injunction prohibiting further administration of the statute in a way that would preclude the plaintiffs from receiving a full share.

Proceedings

The district court held that the court did not have jurisdiction because the plaintiffs' suit was barred by the eleventh amendment or because, in the alternative, the case did not arise under the Constitution, laws or treaties of the United States. This appeal followed.

Analysis

1. Jurisdiction

28 U.S.C. § 1362 provides that the district courts "shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." Are the Native Villages "tribes" which have been "duly recognized by the Secretary of the Interior?" The Native Villages represent bodies of Indians of the same race united in a community under a single government in a particular territory – Noatak at Bering Strait, Circle Village at Upper Yukon-Porcupine. They therefore meet the basic criteria to constitute Tribes. *Montoya v. United States*, 180 U.S. 261, 266, 21 S.Ct. 358, 359, 45 L.Ed. 521 (1901).

No statute expressly outlines how a tribe may become duly recognized for purposes of section 1362 jurisdiction. In *Price v. Hawaii*, 764 F.2d 623, 626 (9th Cir.1985), *cert. denied*, 474 U.S. 1055, 106 S.Ct. 793, 88 L.Ed.2d 771 (1986), this court left open the question whether formal

organization or incorporation of a tribe followed by approval of the organization or incorporation by the Secretary of the Interior constituted being "duly recognized" for the purpose of the statute. We see no reason to suppose that the Secretary of the Interior needs to issue a special document conferring a right to sue under the statute. Noatak Village has a governing body approved by the Secretary. 25 U.S.C. § 476. It is therefore a tribe with a duly recognized governing body and qualifies for the benefits of section 1362. *Cf. Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1387 (9th Cir.1988) (uncertainty existed concerning structure of Alaska Indian villages involved; tribal status not resolved solely by reference to organization of tribe under Indian Reorganization Act).

Circle Village, like Noatak, is listed as a Native Village in the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(b)(1). The purpose of this Act was to make "a fair and just settlement of all claims by Natives and Native Groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a). The Villages acknowledged by the Act were distinguished from ineligible villages "of a modern and urban character," where the majority of the residents were not natives. 43 U.S.C. § 1610(b)(2), (3). The Villages acknowledged by the Act were possessed of aboriginal land claims and became eligible for the benefits provided under the Act. The Act was congressional recognition of the Native Villages.

In addition, in three recently enacted statutes – the Indian Self-Determination Act, 25 U.S.C. § 450b(e); the Indian Financing Act, 25 U.S.C. § 1452(c); and the Indian Child Welfare Act, 25 U.S.C. § 1903(8) – Congress treated the Native Villages as Indian tribes. Arguably, Congress

intended to confer recognition only for the particular purposes of each piece of legislation. *See, e.g., Native Village of Venetie*, 856 F.2d at 1387. But the nature and scope of the federal government's relationship with the Native Villages, as evidenced by these Acts, indicates that the recognition extends to legal claims. "[I]t is a settled principle of statutory construction that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians." *Three Affiliated Tribes v. World Eng'g, P.C.*, 467 U.S. 138, 149, 104 S.Ct. 2267, 2275, 81 L.Ed.2d 113 (1984).

It is true that section 1362 speaks of recognition by the Secretary of the Interior, not Congress, but the Secretary is only using power delegated by Congress. If Congress has recognized the tribe, a fortiori the tribe is entitled to recognition and is in fact recognized by the Secretary of the Interior. Consequently, Circle Village, as well as Noatak, qualifies under section 1362.

2. The Sovereign Immunity of the State of Alaska

The Commissioner contends that the Eleventh Amendment was properly applied by the district court to deny jurisdiction. What has been authoritatively resolved as to the jurisdiction of the federal courts of suits against the states is the following:

One state may not be sued by the citizens of another state. U.S. Const. amend. XI.

The citizens of a foreign state may not sue a state. *Id.*

The citizens of the same state may not sue the state. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

A corporation chartered by Congress may not sue a state. *Smith v. Reeves*, 178 U.S. 436, 20 S.Ct. 919, 44 L.Ed. 1140 (1900).

A foreign state may not sue the state. *Monaco v. Mississippi*, 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282 (1934).

The immunity of the states from suit in these cases has been addressed by the Supreme Court in terms of the Eleventh Amendment, interpreted well beyond its literal language, as *Hans*, *Smith* and *Monaco* vividly illustrate. The Court, it may be felt, has constructed a jurisprudence in respect to this amendment in which the Court's own gloss, the Court's own readings of the amendment's spirit and purpose are what count. The same court that used the strongest language in stating the doctrine of sovereign immunity in *Hans* had no difficulty in subjecting the states to suit by the United States in *United States v. Texas*, 143 U.S. 621, 642, 12 S.Ct. 488, 492, 36 L.Ed. 285 (1892) (relying upon *United States v. North Carolina*, 136 U.S. 211, 10 S.Ct. 920, 34 L.Ed. 336 (1890), *overruled on other grounds*, *West Virginia v. United States*, 479 U.S. 305, 311 n. 4, 107 S.Ct. 702, 707 n. 4, 93 L.Ed.2d 639 (1987)). And in *South Dakota v. North Carolina*, 192 U.S. 286, 24 S.Ct. 269, 48 L.Ed. 448 (1904), the Court held that a state may sue another state in federal courts.

Chief Justice Hughes in *Monaco*, 292 U.S. at 329, 54 S.Ct. at 750, magisterially explained the reason for these differing results. In the cases where jurisdiction was found to exist, the states, by accepting the Constitution,

consented to such jurisdiction as was "inherent in the constitutional plan." *Id*. The states have agreed to federal tribunals "essential to the peace of the Union." *Id*. at 328, 54 S.Ct. at 750.

Thus it is apparent that the literal language of the Eleventh Amendment does not control. Rather, the "principles of federalism" that inform the amendment, *Dellmuth v. Muth*, ___ U.S. ___, 109 S.Ct. 2397, 2400, 105 L.Ed.2d 181 (1989) are what have governed constitutional meaning here. The question consequently is, "Do the principles of federalism implicit in the Eleventh Amendment indicate that the states possess immunity from suit by an Indian tribe?"

Two opinions of the Supreme Court have suggested that there is immunity. In *United States v. Minnesota*, 270 U.S. 181, 46 S.Ct. 298, 70 L.Ed. 539 (1926), the plaintiff was the United States. The court assumed that the affected Indian tribe could not sue Minnesota because of what the Court termed "the general immunity" of the state from suit. *Id*. at 195, 46 S.Ct. at 301. The observation was the purest dictum. Again, in *Arizona v. California*, 460 U.S. 605, 614, 103 S.Ct. 1382, 1388, 75 L.Ed.2d 318 (1983), the Court stated that it was "[a]ssum[ed], *arguendo*," that the intervention by the Indian tribes in the suit would violate the Eleventh Amendment, but held that, since the United States had already presented the claims of the tribes, "the States involved no longer may assert that immunity with respect to the subject matter." As the Court in neither case directly addressed the question, it remained unresolved.

In support of the Commissioner's position there stands the square holding of the Eighth Circuit, per Webster, J., in *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135 (8th Cir.1974). This case held, first, that, although the words of the amendment did not bar suit by an Indian tribe, the Eleventh Amendment should be "liberally construed to achieve its intended purpose," *id.* at 1138, and, so construed, barred the suit; and, second, that 28 U.S.C. § 1362, creating federal jurisdiction of suits by Indian tribes, did not strip the states of their immunity. *Id.* at 1140.

As to the second proposition on the effect of 28 U.S.C. § 1362, there can now be little argument. It has been authoritatively held that to abrogate sovereign immunity of a state, Congress must express its intention to do so "in unmistakably clear language." *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478, 107 S.Ct. 2941, 2948, 97 L.Ed.2d 389 (1987). It has recently been reemphasized that congressional intent to abrogate sovereign immunity "must be both unequivocal and textual." *Dellmuth*, 109 S.Ct. at 2401. The statute conferring jurisdiction of suits brought by tribes does not unmistakably, unequivocally and textually abrogate the state's immunity, if immunity there is.

As to the first proposition that the Eleventh Amendment, liberally interpreted, has bestowed immunity, the question is more complicated. The proper interpretation of the Eleventh Amendment is not achieved by reading it as expansively as possible. A proper reading is a reading consistent with the principles of federalism that inform

the amendment. These principles recognize that a consent by the states to suit may be "inherent in the constitutional plan" and that federal tribunals may be essential to the peace of the United States. It is in consideration of this truth that we respectfully part company with the conclusion of the Eighth Circuit in *Standing Rock*.

Article I, Section 8, Clause 3 of the Constitution provides Congress with power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." As to the tribes, this clause constitutes consent by the states to federal jurisdiction, for three reasons:

First. The tribes constituted a presence within the nascent United States. They were not foreign states that could be ignored or kept at arm's length. Every state in the new union was inhabited by tribes. 4 *Handbook of North American Indians* 7, 213 (W. Sturtevant ed. 1988). The new union could not exist without the allocation of governmental power in relation to them.

Second. Not only were they unlike any foreign nation in being in immediate proximity to the states, the tribes also stood in a relation that could break into armed hostility against the people of the United States. When the Constitution came into being, "[t]he first consideration" of the government as to Indian affairs was "peace." F. Prucha, *American Indian Policy in the Formative Years* 44 (1962). "The country, precariously perched among the sovereign nations of the world, could not stand the expense and strain of a long drawn-out Indian war." *Id.* On August 22, 1789, for example, President

Washington and Secretary of War Knox met with the Senate and set before it the necessity "[t]o conciliate the powerful tribes of Indians in the southern District, amounting probably to fourteen thousand fighting Men. . . . The fate of the southern states . . . may principally depend on the present measures of the Union towards the southern Indians." 2 *Senate Executive Journal and Related Documents* 31 (L. De Pauw ed. 1974).

The power of Congress to make war or peace and the power of the United States to make treaties was exercised in order to secure the states. In practice contemporaneous with the generation that adopted the Eleventh Amendment, the United States made treaties with "the Creek Nation," 7 Stat. 56 (1797), "the Cherokee Nation," 7 Stat. 62 (1798), and "the Choctaw Nation," 7 Stat. 66 (1802). Treaties with the Creeks in 1790, 7 Stat. 35, 37, and with the Cherokees in 1792, 7 Stat. 39, 40, treated the Indian country involved as a country which citizens of the United States could enter only if issued a passport by the United States. The United States entered into a mutual assistance pact with the Wyandots and other tribes by Article II of which the tribes agreed "to give their aid to the United States in prosecuting the war against Great Britain." 7 Stat. 118 (1814). The war power and the treaty power of the federal government have been decisively interpreted as both expanding and confirming the jurisdiction surrendered to the United States by the Indian commerce clause. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559, 8 L.Ed. 483 (1832), *modified on other grounds, Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973); *see* Newton, *Federal Power Over*

Indians: Its Sources, Scope, and Limitations, 132 U.Pa.L.Rev. 195, 202 (1984).

Third. The Power granted to the federal government over Indian affairs displaced the powers regularly exercised by the states within their borders. For example, the states have been unable to exercise criminal jurisdiction within Indian territory. *Worcester*, 31 U.S. (6 Pet.) 515. "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985).

To put the matter in another way, Indian tribes are more like the United States and the individual states of the United States than they are like individual citizens or like foreign states. Indian tribes have been explicitly held not to be foreign states. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18, 8 L.Ed.25 (1831). Indian tribes are not like individual citizens because of their possession of many of the attributes of sovereignty. The view taken of Indian sovereignty by Chief Justice Marshall was reaffirmed by a unanimous Court holding "[t]he Creek or Muskogee Nation or tribe of Indians" free from liability for failure to keep the peace. *Turner v. United States*, 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291 (1919). The tribe, Justice Brandeis wrote for the Court, "exercised within a defined territory the powers of a sovereign people." *Id*. at 355, 39 S.Ct. at 109. It had been recognized by the United States as "a distinct political community." *Id*. at 357, 39 S.Ct. at 110. To invoke even more recent authority it has been held that the Indian Civil Rights Act does not authorize suit

against a tribe because the Act does not explicitly override the tribe's sovereignty, and tribes must be acknowledged as "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978).

Indian tribes, although not states, are like states in their presence within the United States as units of government, to be dealt with peacefully. Their presence as governmental units was as much a reality as the presence of the sister states at the time the Union was formed. Even more importantly, the Indian tribes are like the United States because it has been for their benefit that the United States has frequently sued the states. It is in a modern evolution of this relation between them and the United States that they now act for themselves.

Until 1966 the subjection of the states to the United States in Indian affairs was carried out by a statutory scheme which permitted the United States to vindicate the rights of a tribe. Speaking specifically of the relation of the United States to the Cherokees but using language applicable to the relationship between the United States and any Indian tribe, Justice Hughes wrote that as long as the United States is the guardian of the Indians, "the right and duty of the Nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gain-said." *Heckman v. United States*, 224 U.S. 413, 437, 32 S.Ct. 424, 431, 56 L.Ed. 820 (1912). Addressing the position of the United States as the guardian of non-competent Osage Indians, Chief Justice White upheld the right of the United States to sue "to prevent the systematic violation of the state law committed for the purpose of destroying the rights created by the act of

Congress." *United States v. Board of County Comm'rs*, 251 U.S. 128, 133, 40 S.Ct. 100, 101, 64 L.Ed. 184 (1919).

The general proposition is drawn from these cases "that the United States, by virtue of its special relationship with the Indians, has standing to effectuate federal policies by protecting and enforcing Indian rights arising out of that relationship." F. Cohen, *Handbook of Federal Indian Law* 308 (1982). The federal oversight of Indian affairs is an "exclusive and compelling interest." *See Housing Auth. v. Washington*, 629 F.2d 1307, 1313 (9th Cir.1980) (per Anderson, J.). Since 1966, modern recognition of the ability of a tribe to act for itself has resulted in the enactment of 28 U.S.C. § 1362. In this new form the United States has exercised the authority ceded to it by the states in Article I, Section 8, Clause 3.

That the jurisdiction conceded by the states to the United States was originally exercised by the Congress and the Executive rather than by the federal courts is no refutation of the concession made by the states. In the course of time the United States did exercise its jurisdiction through the federal courts as it acted as the guardian of Indian rights. The modern view is that to the maximum extent possible the trust relation should recognize the autonomy of the tribes. *See The Supreme Court, 1984 Term – Leading Cases*, 99 *Harv.L. Rev.* 120, 262 n. 70 (1985). That view began to predominate in the 1960s. 2 F. Prucha, *The Great Father: The United States Government and the American Indians* 1088 (1984) [hereinafter F. Prucha, *The Great Father*]. As Robert L. Bennett, the Oneida Indian who became Commissioner of Indian Affairs, put it in a report dated July 11, 1966, "Paternalism creates attitudes of dependency which restrains the social and economic

advancement of Indian people. . . . Indian leadership must be brought aboard to the fullest extent possible." Report from Robert L. Bennett to Henry M. Jackson (July 11, 1966), *quoted in* Prucha, *The Great Father*, at 1097. The statute enacted in 1966 is fairly read as the embodiment of the new policy, giving the tribes a right to sue that formerly only the United States exercised.

Section 1362 permits Indian tribes access to federal courts for cases in which the United States Attorney has declined to bring an action. It enables Indian tribes "to seek redress using their own resources and attorneys," S.Rep. No. 1507, 89th Cong., 2d Sess. 2 (1966), and "provides the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys." H.R.Rep. No. 2040, 89th Cong., 2d Sess. 3, *reprinted in* 1966 U.S.Code Cong. & Admin. News 3145, 3147.

It may be asked whether a statute explicitly eliminating immunity is needed to authorize the tribes to sue the states. *See Welch*, 483 U.S. at 478, 107 S.Ct. at 2948. The questions assume that the states possess an immunity that Congress must override. But as *United States v. Texas*, 143 U.S 621, 12 S.Ct. 488, and *South Dakota v. North Carolina*, 192 U.S. 286, 24 S.Ct. 269, show, if the consent of the state was inherent in the plan of the Constitution, no statute is necessary. The consent has already been given, and immunity to be overcome by Congress does not exist. If the suit of the tribes against Alaska depended solely on abrogation of the state's sovereign immunity, the tribe would encounter the teaching that congressional abrogation of state immunity must be by an explicit statute.

Dellmuth, 109 S.Ct. at 2400. But the reason for that requirement is that abrogation of state sovereignty upsets the fundamental balance between the states and the United States. *Id*. Here the balance was struck in 1789.

It may also be asked if the above line of reasoning is not a restatement of the reasoning of Chief Justice Marshall that every surrender of a portion of sovereignty by a state carried with it an admission of liability to suit in the area of sovereignty surrendered. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 380, 5 L.Ed.2d 257 (1821). Such a broad construction of concessions made by the states was repudiated in *Welch*, 483 U.S. at 482 n. 11, 107 S.Ct. at 2950 n. 11. The answer is that Indian affairs are sui generis and that in this unique area concerning relations with non-foreign governmental units, the surrender of state sovereignty carried with it a surrender of immunity from suit.

To recapitulate, there is no need for an explicit overriding of state immunity if the state in consenting to the Constitution has consented to being sued. The state did give consent to federal jurisdiction of Indian affairs. The Eleventh Amendment has not revoked the consent of the states, because neither in terms nor purpose does the amendment apply to Indian tribes. No other general immunity protects the state from suit by the tribes.

Finally, the question may be raised whether the plaintiffs in this case – Alaskan Indian villages – are entitled to the same treatment as the Indian tribes who were present on this continent when the Constitution was adopted. The leading case is *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918). In that

case the United States had acted to protect the fishing rights of the Metlakahtla, a band of about 800 Indians born in British Columbia who migrated to the Annette Islands, a small clump of isles in Southeastern Alaska and there founded a village. In upholding the protective action of the United States, the Court assimilated these foreign-born Alaska Indians to the Indians of the mainland by citing *Choate v. Trapp*, 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941 (1912) and its teaching that laws intended for the Choctaws and Chickasaws were to be liberally interpreted in their favor. Insofar as the present case is concerned, no distinction exists between Alaska Indians and those of the other states.

We conclude the plaintiffs are not barred by immunity of the state of Alaska.

3. *The Federal Causes of Action*

The state maintains that the plaintiffs have not alleged federal causes of action. Obviously there was no duty on the part of Alaska to vote a bonus of $25,000 to each Native Village. Once having voted the bonus, however, the state could not take it away or dilute it on grounds violative of the fourteenth amendment. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). The plaintiffs allege that such a racially based dilution is what has occurred.

The state's answer is, "How can this be? We were giving a bonus to Native Villages whose membership was formed on a racial basis. We got away from the racial basis by making a nonracial criterion the ground for the distribution." The plaintiffs' answer is that the original

scheme of the bonus was based on their identity as political entities. To wipe out their political status on the ground that that status had an ethnic origin is itself a violation of the constitutional command not to discriminate on the basis of race. Paradoxical as it is, the allegation that the move from a tribal basis to a non-tribal basis for the bonus was racially discriminatory is an intelligible claim. Any governmental action based on the racial character of those affected is presumptively invalid. *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 485, 102 S.Ct. 3187, 3202, 73 L.Ed.2d 896 (1982) (quoting *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272, 99 S.Ct. 2282, 2292, 60 L.Ed.2d 870 (1979)). Alleging that such discrimination has happened here, the Native Villages have presented a claim which is neither plainly meritless under the Constitution nor foreclosed by prior cases. *Cf. Hagans v. Lavine*, 415 U.S. 528, 543, 94 S.Ct. 1372, 1382, 39 L.Ed.2d 577 (1974). Whether these allegations state a claim upon which relief can be granted is beside the point at this stage of the case. *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946). The scope of our present inquiry is limited to a determination of whether the district court had jurisdiction. We hold that it did.

The Native Villages also properly invoked federal subject matter jurisdiction by their allegation that the Commissioner violated federal laws and policies intended to further tribal self-government. If, as they contend, the Commissioner acted because he believed that the Native Villages could not receive special benefits from the state, the Commissioner did act in an area where the action may be found to have been preempted by federal law. *White Mt. Apache Tribe v. Bracker*, 448 U.S. 136, 100

S.Ct. 2578, 65 L.Ed.2d 665 (1980). Similar conclusions follow as to the third and fourth causes of action where again it may be found that the action of the Commissioner was such as to deny the political reality of the Native Villages because of the Commissioner's view of their racial composition. The pendent claims are cognizable if the four federal claims confer jurisdiction. Accordingly, the decision of the district court is REVERSED and the case REMANDED for further proceedings.

KOZINSKI, Circuit Judge, dissenting:

I am unable to join my colleagues in exploring the boundaries of the eleventh amendment because I do not agree that the district court had subject matter jurisdiction. Subject matter jurisdiction and sovereign immunity are both threshold inquiries, but the former presents a far easier question and I would therefore dispose of the case on those grounds. While I don't necessarily disagree with the majority's analysis of the eleventh amendment, I cannot help being concerned that it unnecessarily decides not one, but two difficult constitutional questions not properly before the court: whether Indian tribes are exempt from the eleventh amendment's restrictions on suits against states in federal court and, if so, whether the native villages are Indian tribes for purposes of that amendment.[1] In so doing, the majority opinion creates a

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[1] The majority devotes substantial attention to whether the native villages are "Indian tribe[s] or band[s] with a governing body duly recognized by the Secretary of the Interior" for purposes of obtaining jurisdiction under 28 U.S.C. § 1362. Majority op. at 1160. This may be a fundamentally different

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conflict with one of our sister circuits, *see Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140-41 (8th Cir.1974) (eleventh amendment applies to Indian tribes), and may in fact be contrary to two holdings of the Supreme Court, *see Arizona v. California*, 460 U.S. 605, 614, 103 S.Ct. 1382, 1388, 75 L.Ed.2d 318 (1983) (assuming that the eleventh amendment applies to Indian tribes); *United States v. Minnesota*, 270 U.S. 181, 195, 46 S.Ct. 298, 301, 70 L.Ed. 539 (1926) (same). In light of these real and potential conflicts, I would await a case where our jurisdiction is more secure before expounding on these difficult issues of eleventh amendment jurisprudence. I must therefore respectfully dissent.

To state a federal claim, it is not enough to invoke a constitutional provision or to come up with a catalogue of federal statutes allegedly implicated. Rather, as the Supreme Court has repeatedly admonished, it is necessary to state a claim that is substantial: "[T]he federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit.' 'wholly insubstantial,' 'obviously frivolous,' 'plainly unsubstantial,' or 'no longer open to discussion.' " *Hagans v. Lavine*,

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question than whether the native villages are tribes under the eleventh amendment. If, as the majority suggests, the eleventh amendment doesn't apply to Indian tribes because "Indian tribes are more like the United States and the individual states of the United States than they are like individual citizens or like foreign states," *id.* at 1163, shouldn't the majority determine whether the native villages fit this description? Or, is any organized group of Indians exempt from the eleventh amendment's restrictions?

415 U.S. 528, 536-37, 94 S.Ct. 1372, 1378-79, 39 L.Ed.2d 577 (1974) (citations omitted). We do not have jurisdiction over a claim, no matter how federal it purports to be, that is " 'patently without merit, or so insubstantial, improbable, or foreclosed by Supreme Court precedent as not to involve a federal controversy.' " *City of Las Vegas v. Clark County*, 755 F.2d 697, 701 (9th Cir.1985) (quoting *Demarest v. United States*, 718 F.2d 964, 966 (9th Cir.1983), *cert. denied*, 466 U.S. 950, 104 S.Ct. 2150, 80 L.Ed.2d 536 (1984)).

While this doctrine has been criticized, *see, e.g., Hagans*, 415 U.S. at 538, 94 S.Ct. at 1379; *Rosado v. Wyman*, 397 U.S. 397, 404, 90 S.Ct. 1207, 1213, 25 L.Ed.2d 442 (1970); *Bell v. Hood*, 327 U.S. 678, 682-83, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946), it serves an important practical purpose: It prevents plaintiffs from using a federal court's pendent jurisdiction to propel state claims into federal court by attaching them to meritless federal claims. *See Hagans*, 415 U.S. at 555, 94 S.Ct. at 1388 (Rehmquist, J., dissenting); *Silver v. Louisville & Nashville R.R.*, 213 U.S. 175, 191-92, 29 S.Ct. 451, 454-55, 53 L.Ed. 753 (1909). And that is precisely what's happening here.

In 1980, the Alaska Legislature enacted a revenue sharing program according to which all unincorporated communities with a Native village government would receive $25,000 a year. The following year, the state Attorney General advised the Department of Community and Regional Affairs, the state agency responsible for implementing the program, that the program violated the equal protection and public purpose clauses of the Alaska Constitution, art. I, § 1 and art. IX, § 6. In order to comply with the state constitution, the Department made the funds available to all unincorporated communities,

whether or not they had Native village governments. The appellants, whose share of the pie may have been diminished when the class of recipients was broadened, disagreed with the Attorney General's analysis and filed this suit.

The villages' purported federal claim is that the state, once having decided to favor Indians over other citizens, is not precluded from treating them the same. As a matter of federal equal protection, this claim is frivolous: I am aware of no constitutional provision that requires a state to treat Indians and non-Indians differently. While the equal protection clause may *permit* states to favor Indians, it certainly does not compel it. The villages' equal protection claim is not aided in any way by the fact that the state Attorney General's equality requirement is based on the Alaska Constitution; the federal equal protection clause does not preclude the states from adopting constitutional provisions that guarantee equal treatment for their citizens.

Equally frivolous are the villages' claims based on various federal statutes intended to further tribal self-government. The Indian Reorganization Act, 25 U.S.C. §§ 461-79 (1982 & Supp. IV 1986), comprises a hodgepodge of statutes relating to land transfer and tribal organization. The Indian Civil Rights Act of 1968, Pub.L. 90-284, 82 Stat. 77-80 (codified as amended in scattered sections of title 25), extends a number of federal constitutional rights to members of Indian tribes and authorizes state courts to assume jurisdiction over certain causes of action arising on Indian reservations. The Indian Financing Act of 1974, Pub.L. 93-262, 88 Stat. 77 (codified as amended in scattered sections of title 25), provides credit

to members of Indian tribes. The Indian Self-Determination and Education Assistance Act, Pub.L. 93-683, 88 Stat. 2203 (codified as amended in scattered sections of titles 5, 25, 42 & 50), provides federal assistance for, among other things, tribal governments and school districts educating tribe members. The Indian Health Care Improvement Act, Pub.L. 94-437, 90 Stat. 1400 (codified as amended in scattered sections of title 25), as its name implies, relates to health care. The Indian Child Welfare Act of 1978, Pub.L. 95-908, 92 Stat. 3069 (codified as amended in scattered sections of title 25), includes provisions covering child custody proceedings and federal assistance for various family-related programs. Many of these statutes provide money to Indian tribes, but that is the full extent of their relevance to this lawsuit. By no stretch of the imagination do they preempt state constitutional provisions calling for equal treatment of Indians and non-Indians.

The villages' third and fourth federal causes of action are similarly insubstantial. Section 476 of title 25 permits Indian tribes to organize, adopt a constitution, and negotiate with the federal, state and local governments. It is difficult to ascertain exactly how this statute could be violated by diluting the villages' share of state revenues. The villages' contention that the dilution extinguished their powers of self-government and destroyed their Native culture, in violation of the first amendment, is hyperbole.

It is a "fundamental and long-standing principle of judicial restraint . . . that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lying v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 108 S.Ct. 1319, 1323, 99 L.Ed.2d 534 (1988);

see also Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501-02, 105 S.Ct. 2794, 2800-01, 86 L.Ed.2d 394 (1985); *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157-58, 104 S.Ct. 2267, 2278-79, 81 L.Ed.2d 113 (1984). Although the majority undoubtedly sees it differently, it clearly violates this principle by deciding two difficult questions of eleventh amendment jurisprudence not properly before this court. Even under the most generous construction of the federal Constitution and title 25 of the United States Code, the four federal claims fit any of the *Hagans* formulations of insubstantiality: They are "obviously frivolous;" they are "plainly unsubstantial;" they are "absolutely devoid of merit." They serve a single purpose: to transport state claims into federal court. I would accordingly affirm the district court's dismissal of lack of substantial federal question and save these difficult eleventh amendment issues for another day. Judging from the state's relationship with the villages, that day may be coming soon enough.

APPENDIX C

PRINCIPAL CONSTITUTIONAL PROVISIONS AND STATUTES

Article I, Section 8, clause 3 of the United States Constitution states that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

Article III, Section 2 of the United States Constitution states in relevant part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; – to all cases affecting ambassadors, other public ministers and consuls; – to all cases of admiralty and maritime jurisdiction; – to controversies to which the United States shall be a party; – to controversies between two or more states; – between a state and citizens of another state; – between citizens of different states; – between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

The Eleventh Amendment to the United States Constitution states:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Section 3(c) of the Alaska Native Claims Settlement Act (43 U.S.C. § 1602(c)) states:

> "Native village" means any tribe, band, clan, group, village, community, or association in Alaska listed in sections 1610 and 1615 of this title, or which meets the requirements of this chapter, and which the Secretary determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives.

Section 1 of the Alaska amendments to the Indian Reorganization Act (25 U.S.C. § 473a) states:

> Sections 461, 465, 467, 468, 475, 477, and 479 of this title shall after May 1, 1936, apply to the Territory of Alaska: *Provided*, That groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title.

28 U.S.C. § 1362 states:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.